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No. 91-

In The
Supreme Court of the United States
October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTION PRESENTED

Is a probationer's privilege against self-incrimination under the Fifth Amendment as applied to the states through the Fourteenth Amendment violated by the revocation of his probation for failure to comply with the condition that he complete sex offender therapy when the successful completion of the therapy requires the probationer to accept responsibility for the crime of which he was convicted?

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OPINION BELOW

The opinion of the Montana Supreme Court is reported at 813 P.2d 979. (App. 1a.)

JURISDICTION

The state court opinion was filed on June 18, 1991. (App. 1a) The order denying the petition for rehearing was filed July 23, 1991. (App. 26a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution:

> No person ... shall be compelled in any criminal case to be a witness against himself[.]

2. Mont. Code Ann. § 45-5-502 (1989):

> **Sexual assault.** (1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.
>
> (2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.
>
> (3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years and may be fined not more than $50,000.
>
> (4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.
>
> (5) Consent is ineffective under this section if the victim is less than 14 years old and the offender is 3 or more years older than the victim.

STATEMENT OF THE CASE

Following a jury trial at which he maintained his innocence, Donald Imlay was found guilty of felony sexual assault of a seven-year-old girl in violation of Mont. Code Ann. § 45-5-502(3) (1989). Imlay was sentenced to five years in the Montana State Prison, with all of the prison term suspended on the primary condition that he "immediately enroll in a sexual therapy program at his own expense and continue said program until his therapist deems further counseling and therapy unnecessary." (App. 19a-20a.)

Imlay enrolled in a sexual therapy program and participated in the program for four months, meeting with his therapist a total of six times. Throughout therapy, Imlay denied that sexual contact had occurred between himself and the child. No progress was made in the therapy because of Imlay's continued denial. The therapist informed Imlay that he could not continue with outpatient treatment unless he accepted responsibility for the act of which he had been convicted.

A petition to revoke Imlay's probation was filed because of Imlay's failure to complete the outpatient sexual therapy program. At the revocation hearing, the therapist testified that because of his continued denial Imlay was not acceptable for outpatient treatment. The therapist recommended inpatient treatment for Imlay, so that therapy could be provided on a more regular, structured basis than outpatient therapy. The only inpatient treatment center for sex offenders is located at the Montana State Prison.

Imlay's suspended sentence was revoked because his continued denial of guilt of the act of which he had been convicted foreclosed acceptance into the outpatient sex

offender treatment program. (App. 24a-25a.) The state district court concluded that the only viable alternative was for Imlay to attend the inpatient sex offender program at the Montana State Prison. (App. 24a.) The state district court sentenced Imlay to five years in the Montana State Prison, recommending that Imlay be eligible for parole once he completed the sexual offender program at the prison. (App. 25a)

Imlay appealed this decision to the Montana Supreme Court, claiming that the condition to comply with sex offender treatment was unconstitutionally vague, that it violated his right to self-expression protected under the First Amendment to the United States Constitution and that the condition was generally inequitable and unfair. Imlay did not raise on appeal the issue of whether the condition to complete sex offender treatment violated his privilege against self-incrimination. However, the Montana Supreme Court raised the issue *sua sponte*, concluding that the condition to complete the sex offender program violated Imlay's privilege against self-incrimination because it required his admission of guilt for the crime of which he had been convicted. Relying upon federal case law[1] and

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[1]The Montana Supreme Court relied almost exclusively on the holding in Thomas v. United States, 368 F.2d 941 (5th Cir. 1966), which held that the federal district court erred in augmenting the sentence of a defendant who refused to admit his guilt for the crime of which he had been convicted. The state court noted, however, that this holding was expressly rejected by the Ninth Circuit Court of Appeals in Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969).

the Fifth Amendment to the United States Constitution,[2] the Montana Court vacated the sentence.[3]

REASONS FOR GRANTING THE WRIT

The State of Montana petitions this Court for a writ of certiorari because the state court decided a substantial federal question in conflict with applicable decisions of this Court, with the Circuit Court of Appeals for the Ninth Circuit within which the State of Montana is located, and with the decision of another state's highest court. In particular, the decision is in conflict with this Court's holding in Minnesota v. Murphy, 465 U.S. 435 n.7 (1984), in which it was held that a probationer has no

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[2]The Montana Court held: "[W]e believe that the better reasoned decisions are those decisions which protect the defendant's constitutional right against self-incrimination, and which prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." (App. 14a.) The "better reasoned decisions" referred to by the Montana Court are decisions that relied upon the Fifth Amendment to the United States Constitution or the Fourteenth Amendment to the United States Constitution. At no time in the opinion did the Montana Court refer to Art. II, § 25 of the Montana Constitution, which provides that "[n]o person shall be compelled to testify against himself in a criminal proceeding."

[3]Imlay has been resentenced by the state district court. The court imposed a five-year sentence at the Montana State Prison, without the condition or recommendation that he undergo in-patient sex offender treatment. Because the sex offender treatment program at the prison also requires any individual to accept responsibility for the act of which he has been convicted, the State is still precluded from requiring Imlay to participate in any sex offender treatment at the prison or otherwise. *See* App. 12a-13a. The state court decision effectively eradicated the possibility of court-ordered treatment for probationers, parolees and inmates whenever the treatment requires the patient to accept responsibility for the act of which he was convicted.

privilege against self-incrimination with respect to questions concerning his probationary status when there is no realistic threat of incrimination in a separate criminal proceeding. Further, the state court's decision is in conflict with this Court's holding in Allen v. Illinois, 478 U.S. 364 (1986), in which this Court held that the privilege against self-incrimination was not available in civil proceedings even when the result of the proceedings is deprivation of liberty, as long as the purpose of the proceedings is to provide treatment. Here, the probationer had no privilege against self-incrimination because his silence was considered solely with respect to revocation proceedings which are civil proceedings.[4] Also, there was no realistic threat that his silence or any statements he might have made with respect to the crime of which he was convicted would have been used in a future criminal prosecution. Finally, his participation in the sexual therapy program was required solely for purposes of treatment and rehabilitation.

The Montana Supreme Court decision is also in direct conflict with the holdings of the United States Court of Appeals for the Ninth Circuit. The Montana Court concedes that its decision conflicts with Gollaher v. United States, 419 U.S. 520 (9th Cir. 1969).[5] Further, as more completely discussed below, the Montana Court's reliance upon Thomas v. United States, 368 F.2d 941 (5th Cir.

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[4]Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty).

[5]*See also* United States v. Gonzalez-Mares, 752 F.2d 1485, 1489 (9th Cir. 1985), in which the Ninth Circuit acknowledges the holding in Minnesota v. Murphy, *supra*, that a probationer is not entitled to invoke the privilege against self-incrimination in response to questions about his probation status.

1966), is misplaced in light of the adoption of the federal sentencing guideline, § 3E1.1, U.S.S.G., which expressly allows consideration of acceptance of responsibility in determining the length of a defendant's sentence.

Lastly, the Montana Supreme Court decision conflicts with State v. Gleason, 576 A.2d 1246 (Vt. 1990), in which the Vermont Supreme Court held that a sex offender's failure to discuss, during therapy, the crime of which he was convicted provided an adequate basis to revoke probation and did not offend the privilege against self-incrimination.[6]

The substantial nature of the federal question presented, moreover, cannot be overemphasized. The Montana Supreme Court decision effectively eviscerates sex offender programs and any other similar therapy programs. The issue here involves the balancing of the fundamental privilege against self-incrimination with the treatment that is available, and hopefully beneficial, to not only sex offenders, but any offender for whom treatment to overcome denial of a problem would be rehabilitative and beneficial. As such, this matter is of significant consequence, not only for sex offender treatment programs, but also for other therapy and treatment

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[6]The state court holding also conflicts with the decisions of other lower federal and state courts. In Russell v. Eaves, 722 F. Supp. 558 (E.D. Mo. 1989), the federal district court found that the Fifth Amendment challenge to a prison's sex offender treatment program was "legally frivolous," citing Allen v. Illinois, *supra*, for the proposition that the program was not a criminal proceeding but a clinical rehabilitative program. In Henderson v. State, 543 So. 2d 344 (Fla. Dist. Ct. App. 1989), a Florida intermediate appellate court upheld a requirement that sex offenders admit responsibility for the acts of which they were convicted stating that there was no privilege against self-incrimination with respect to the crime for which the offender had been convicted.

programs which require a patient to admit to his behavior as a condition of successful treatment.[7]

I. THE STATE COURT ERRED BY HOLDING THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS AVAILABLE TO A PROBATIONER WITH RESPECT TO STATEMENTS CONCERNING THE CRIME FOR WHICH HE HAS ALREADY BEEN CONVICTED WHEN THE STATEMENTS COULD NOT REALISTICALLY BE USED IN A FUTURE CRIMINAL PROSECUTION.

The Fifth Amendment privilege against self-incrimination, applicable to the states through the Fourteenth Amendment,[8] provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself." The privilege "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers *might incriminate him in future criminal proceedings.*'" (Emphasis added.) Minnesota v. Murphy, 465 U.S. 420, 426 (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)). It is axiomatic that the self-incrimination which the Amendment forbids is exposure to a criminal charge. Ullmann v. United States, 350 U.S. 429, 431 (1956); Reina v. United States, 364 U.S. 512, 516

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[7]*See, e.g.*, People v. Baker, 526 N.E.2d 157 (Ill. 1988), in which the Illinois Supreme Court discusses the privilege against self-incrimination and the admission of past drunken driving convictions in the context of treatment for abuse of alcohol and drugs.

[8]Malloy v. Hogan, 378 U.S. 1 (1964).

v. United States, 364 U.S. 512, 516 (1960). Here, the state court failed to recognize that there was never any danger or realistic threat that Imlay's responses during therapy would be used to incriminate him in any future criminal proceeding. He had already been convicted of the crime of sexual assault and could not again be so convicted. In State v. Gleason, *supra*, the Vermont Supreme Court recognized that "the imposition of sentence extinguishes the privilege against self-incrimination with respect to the crime of which the accused is convicted and, because of the protection against double jeopardy, defendant faces no threat of subsequent prosecution for the offense." 576 A.2d at 1250.

The Montana Supreme Court suggested that Imlay was under the threat of perjury. (App. 14a.) While it is unclear from the opinion, presumably, the Court reasoned that because Imlay testified to his innocence at trial and denied the sexual assault, there was the realistic threat of prosecution for perjury if he admitted the crime during post-sentencing therapy. Not only is it unrealistic to suggest that Imlay would be prosecuted for complying with a probationary condition,[9] it is also well settled that the Fifth Amendment privilege may not be used to shield perjury. *See* United States v. Wong, 431 U.S. 174, 178 (1977) ("[T]he Fifth Amendment privilege does not condone perjury"); United States v. Grayson, 438 U.S. 41, 54 (1978) ("There is no protected right to commit perjury"). The threat of a possible perjury charge is not a realistic threat of future criminal prosecution that is

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[9]Prior Montana case law indicates that such statements, made during the course of therapy, would not be admissible in a future criminal proceeding. State v. Thiel, 768 P.2d 343, 345 (Mont. 1989) (violation of Fifth Amendment privilege occurs if future charges are based on uncharged criminal acts that are revealed during a mental evaluation).

protected by the Fifth Amendment privilege against self-incrimination.

The state court also suggests that there was an impermissible penalty imposed upon Imlay for exercising his privilege against self-incrimination because he had his probation revoked and was sent to the Montana State Prison for inpatient treatment. (App. 14a.) By viewing probation revocation as an impermissible penalty, the state court seems to be invoking the "penalty" cases of this Court without an analysis of any of the reasoning in those cases.[10] If it can be inferred that the state court was relying upon the "penalty" cases, then such reliance was nonetheless in error and a misconstruction of this Court's cases.

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[10]The "penalty" cases include those cases in which the State has compelled a witness to testify, inducing him to choose between the exercise of his Fifth Amendment rights and the imposition of economic or other sanctions. *See* Garrity v. State of New Jersey, 385 U.S. 493 (1967) (statements made under the threat of removal from office may not be used in subsequent criminal proceedings); Gardner v. Broderick, 392 U.S. 273 (1968) (discharge from employment for refusal to waive privilege against self-incrimination is violative of Fifth Amendment); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280 (1968) (loss of employment is an impermissible penalty for exercising privilege against self-incrimination); Lefkowitz v. Turley, 414 U.S. 70 (1973) (threat of substantial economic sanctions creates involuntary waiver of Fifth Amendment privilege); Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (regulation requiring waiver of Fifth Amendment privilege or loss of political office imposed impermissible penalty for exercising privilege). In each penalty case, the choice was between the possibility of use of the statements in future criminal proceedings or imposition of sanctions. Such a choice was not imposed upon Imlay because the statements solicited at therapy concerned solely the crime of which he was convicted and would not expose Imlay to any future criminal prosecution.

As this Court recognized in Minnesota v. Murphy, *supra*, the threat of revocation would be impermissible to pressure a defendant to answer questions that would incriminate him *in a pending or later criminal prosecution*. 465 U.S. at 435. Here, the therapist wanted answers to questions concerning only the crime of which Imlay had already been convicted and sentenced. As discussed above, Imlay's responses would not have served to incriminate him in a future criminal prosecution in which the Fifth Amendment privilege would afford him protection. Any statements that Imlay may have made could not have been considered "compelled" statements protected by the Fifth Amendment. Imlay had the choice to remain silent or to discuss the conduct for which he had already been convicted. At no time was Imlay compelled to make incriminating statements.[11]

In Minnesota v. Murphy, *supra*, this Court recognized that questions that might result in revocation of probation are permissible questions because the revocation proceedings are civil proceedings and cannot be considered pending or later criminal prosecutions. After acknowledging that the "classic" penalty situation would arise if a probationer was threatened with revocation in order to obtain statements concerning uncharged criminal conduct, this Court made a very important qualifying note:

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[11]In State v. Gleason, 576 A.2d at 1246, the Vermont Supreme Court recognized that because the probationer was required to describe only the crimes of which he had been convicted, the State had not taken the "impermissible step of compelling a defendant to make incriminating statements and jeopardizing his conditional liberty." Similarly, in Russell v. Eaves, 722 F. Supp. at 560-61, the federal district court reasoned that the statements sought in the prison sex offender program concerned only the crime of which the plaintiff had been convicted and therefore the plaintiff had the choice of refusing to participate in the program. *See also* Henderson v. State, *supra*.

> The situation would be different if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding. ... Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. ... Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer. ...
>
> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. ... [A]nd nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by the finder of fact" in deciding whether other conditions of probation have been violated. *Lefkowitz v. Cunningham, supra*, 431 U.S., at 808, n. 5, 97 S.Ct., at 2137, n. 5. See *Baxter v. Palmigiano*, 425 U.S. 308, 317-318, 96 S.Ct. 1551, 1557-1558, 47 L.Ed.2d 810 (1976).

Minnesota v. Murphy, 465 U. S. at 434 n.7 (some citations omitted). Thus, while the threat of revocation of a suspended sentence is not permissible with respect to statements concerning a separate criminal proceeding, such a threat does not invoke an impermissible "penalty" if the statements are a required condition for probation

and relate to the matter for which a defendant has already been convicted.

Based upon this footnote in Minnesota v. Murphy, this Court has stated that "a person may not claim the privilege [against self-incrimination] merely because his answer might result in revocation of his probationary status." Allen v. Illinois, 478 U.S. at 372. Similarly, a person may not claim the privilege because his silence might result in revocation of his probationary status.

II. THE STATE COURT ERRED BY HOLDING THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS AVAILABLE TO A PROBATIONER WITH RESPECT TO STATEMENTS CONCERNING THE CRIME FOR WHICH HE HAS ALREADY BEEN CONVICTED WHEN THE STATEMENTS ARE REQUIRED SOLELY FOR THE PURPOSES OF TREATMENT AND REHABILITATION.

In Allen v. Illinois, *supra*, this Court expressly recognized that, in the context of alleged Fifth Amendment violations, a distinction must be made between statements that would be used for treatment and those that might be used for punishment. In deciding that the right against self-incrimination did not apply to an Illinois proceeding designating a defendant as a sexually dangerous person, this Court stated:

> The Court in *Gault* [387 U.S. 1 (1967)] was obviously persuaded that the State intended to *punish* its juvenile offenders, observing that in many States juveniles may be placed in "adult penal institutions" for conduct that if committed by an adult would be a crime. ... Here, by

> contrast, the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment. That the Menard Psychiatric Center houses not only sexually dangerous persons but also prisoners from other institutions who are in need of psychiatric treatment does not transform the State's intent to treat into an intent to punish. [Emphasis in original.]

478 U.S. at 373. If statements are therefore required for treatment and rehabilitation rather than punishment then the statements cannot be considered incriminating.[12] Here, the intent of the condition that Imlay undergo sex offender treatment was not to punish Imlay or inflict any sort of penalty upon him, but to allow Imlay to attend the outpatient sex offender therapy. When Imlay's probation was revoked, the district court recognized that he was not amenable to outpatient therapy, and hoped that inpatient therapy, available only at the Montana State Prison, would

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[12]This distinction is also important in the context of presentence and pretrial examinations. In that context this Court has recognized that when a mental examination is not used to "punish" the defendant, then there is no violation of the Fifth Amendment privilege. *See* Estelle v. Smith, 451 U.S. 454 (1981); Taylor v. Best, 746 F.2d 220, 224 (1984) (no Fifth Amendment violation when the clear purpose of the mental evaluation is to evaluate the prisoner so that he may be assigned to the appropriate institution at the appropriate custody level with a basic program plan for treatment that fits his rehabilitation and training needs); *but cf.* Asherman v. Meachum, 932 F.2d 137 (2d Cir. 1991), *reh'g en banc pending* (requirement to undergo mental examination for purposes of determining continued supervised home release is violative of Fifth Amendment privilege); Mace v. Amestoy, 765 F. Supp. 847 (D. Vt. 1991) (probationer must be granted immunity for statements made during sex offender treatment concerning *uncharged* criminal acts).

be more successful. The intent was to provide treatment, not punish Imlay. (App. 24a.)

In Allen v. Illinois, 478 U.S. at 372, this Court recognized that involuntary incarceration does not itself trigger the entire range of criminal procedural protection. Disapproving of prior statements in In re Gault, 387 U.S. at 50, this Court stated: "First, Gault's sweeping statement that 'our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty' ... *is plainly not good law*." 478 U.S. at 372 (emphasis added) (citation omitted). Even though silence may result in revocation, the loss of liberty does not offend the privilege against self-incrimination because the revocation proceeding is not a criminal proceeding and because the loss of liberty was based upon a concern for treatment and rehabilitation, rather than punishment.

III. THE STATE COURT'S RELIANCE UPON THOMAS IS MISPLACED.

By focusing upon Thomas v. United States, *supra*, the state court failed to recognize the above-discussed controlling precedent of this Court on the scope of the protection afforded under the privilege against self-incrimination. Thomas and the line of case law relied upon by the Montana Supreme Court are not applicable to the present situation and are not controlling with respect to the application of the Fifth Amendment privilege in probation revocation proceedings. Thomas involved the allocution stage of sentencing in which a defendant is allowed to make any statement in his own behalf. The court in Thomas held that a sentencing court violates a defendant's privilege against self-incrimination by "augmenting" his sentence if he fails to accept

responsibility for the crime. With respect to the revocation of Imlay's probation, there was no "augmentation" of the sentence when Imlay's probation was revoked. The state district court had shown leniency to Imlay by giving him the opportunity for treatment. The rescission of that leniency when it was discovered that Imlay was not amenable to treatment was not an "increase" or "augmentation" of the sentence. The Montana court simply erred in applying the Thomas reasoning to a probation revocation situation.[13]

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[13] There is further significant doubt as to whether the Thomas decision can be considered controlling authority in light of the adoption of § 3E1.1, U.S.S.G., which allows the consideration at sentencing of a defendant's acceptance of responsibility for the crime of which he has been convicted. While there may be a subtle difference between augmenting a sentence by failing to accept responsibility and decreasing a sentence by accepting responsibility, the Fifth Circuit Court of Appeals now allows consideration of admission of guilt to reduce a sentence. See United States v. Mourning, 914 F.2d 699 (5th Cir. 1990). While the circuits may differ as to whether § 3E1.1 encompasses criminal conduct other than that for which a defendant has been convicted, the circuits uniformly hold that the sentencing guideline does not offend the Fifth Amendment with respect to the crime for which a defendant has been convicted. United States v. Paz Uribe, 891 F.2d 396 (1st Cir. 1989) (no self-incrimination violation because § 3E1.1 merely codifies a tradition of leniency, not enhancement of a sentence); United States v. Oliveras, 905 F.2d 623 (2nd Cir. 1990) (no violation of the privilege against self-incrimination with respect to the counts to which a defendant plead guilty); United States v. Gonzalez, 897 F.2d 1018 (9th Cir. 1990) (Fifth Amendment not offended by defendant who seeks reduction under § 3E1.1 but who maintained his innocence throughout trial); United States v. Rogers, 921 F.2d 975 (10th Cir. 1990) (no violation of Fifth Amendment because defendant was required to divulge circumstances of the crime for which he was convicted, not circumstances concerning unproved, uncharged conduct); United States v. Henry, 883 F.2d 1010 (11th Cir. 1989) (no self-incrimination violation for defendant who maintained innocence at

(continued...)

Even if the Thomas decision can be considered applicable current authority, the decision is in direct conflict with the decisions of the Ninth Circuit Court of Appeals. In Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969), that circuit stressed the importance for rehabilitation purposes of the sentencing court considering the acceptance of responsibility of the crime of which a defendant has been convicted. The Gollaher court stated:

> It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault. In the present state of the criminal law, there is no doubt that punishment is still a consideration in the imposition of sentence, especially where non-violent or economic crimes are involved. But to the extent that rehabilitation is the objective, no fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence.

419 F.2d at 530. In United States v. Hull, 792 F.2d 941 (9th Cir. 1986), the Ninth Circuit reaffirmed this reasoning and held that, with respect to the privilege against self-incrimination, a federal district court could properly deny probation for failure to accept responsibility for the act of which the offender had been convicted. Quoting United States v. Segal, 549 F.2d 1293, 1299 n.3 (9th Cir. 1977), the Court stated, "[A] sentencing court could impose a harsh sentence as a penalty for the defendant's refusal to admit his guilt, since an admission would evidence the first step in rehabilitation." 792 F.2d at 943. Thus, assuming

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[13](...continued)
trial because Court was unwilling to equate the possibility of leniency with impermissible punishment).

arguendo that the Thomas line of cases is applicable, there is nevertheless significant conflict between the Ninth Circuit Court of Appeals and the Thomas line of cases on the issue of whether the district court can consider the acceptance of responsibility by a convicted defendant prior to sentencing.

CONCLUSION

Because the lower court's decision so clearly conflicts with prior precedent of this Court and because of the significant and substantial consequences such a decision has upon treatment for criminal defendants, the State of Montana respectfully requests that the petition for certiorari be granted and that the state court's judgment below be summarily reversed. Alternatively, the petitioner requests that the petition be granted and that full briefing and argument be scheduled.

Respectfully submitted,

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October 1991

APPENDIX

APPENDIX

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No. 90-493
IN THE SUPREME COURT OF THE
STATE OF MONTANA 1991

STATE OF MONTANA,
Plaintiff and Respondent,
v.
DONALD GLENN IMLAY,
Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District, In and for the County of Cascade, The Honorable Joel G. Roth, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Billy B. Miller, Miller & Cook
Great Falls, Montana

For Respondent:

Honorable Marc Racicot, Attorney General, Helena, Montana; Elizabeth L. Griffing, Assistant Attorney General, Helena, Montana; Patrick L. Paul, Cascade County Attorney, Great Falls, Montana; Kim Schulke, Chief Deputy County Attorney, Great Falls, Montana

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Submitted on Briefs: March 28, 1991
Decided June 18, 1991

Filed: /s/ Ed Smith

Justice Terry N. Trieweiler delivered the opinion of the Court.

Following a jury trial, the defendant, Donald Glenn Imlay, was convicted in District Court of sexual assault, a felony, in violation of § 45-5-502, MCA. Based on that conviction, he was sentenced by the District Court to five years in the Montana State Prison. However, all but 35 days of that sentence were suspended, and the defendant was placed on formal probation, under certain conditions, including the condition that he enroll in and complete a sexual therapy program. When the defendant enrolled in, but was unable to complete the sexual therapy program, his suspended sentence was revoked and he was ordered imprisoned at the Montana State Prison for the remainder of his five-year term. The defendant appeals from the District Court's order revoking his suspended sentence. We reverse the order of the District Court.

On appeal, the defendant raises several issues. We find the following issue, as restated by this Court, to be controlling:

Can a criminal defendant, as a condition of a suspended sentence, be compelled to admit that he is guilty of the crime of which he has been accused and convicted?

FACTUAL BACKGROUND

On May 9, 1989, the State of Montana was granted leave to file an Information charging the defendant with three counts of sexual assault, a felony. On September 5, 1989, that Information was amended so that the acts complained of were combined into one count. The basis for the Information was the allegation that on April 11, 1989, the defendant fondled the vaginal area of a seven-

year-old girl while she was present at his Great Falls grocery store. The Information was based on statements made by the girl to her teacher after she arrived at school several hours late.

This case went to trial on September 11, 1989, and the jury returned its verdict on September 13, 1989, finding the defendant guilty of the crime charged.

Prior to sentencing, the usual pre-sentence investigation was conducted, including a psychological evaluation of the defendant. As a result of that investigation, the District Court found that the defendant was a 56-year-old widower who had raised four adult children [sic] and had an extensive history of full-time employment. He had no prior criminal record, nor was there any prior history of any complaints of similar conduct by the defendant.

The psychologist who examined the defendant, as part of the pretrial investigation, concluded that he was suffering from post-traumatic stress syndrome and was in a severely depressed state of mind. He recommended that the defendant not be incarcerated, but that he be involved in a mental health therapeutic program with psychiatric work and counseling.

Based upon its pre-sentence investigation, the District Court found that the defendant was not a dangerous person, that his offense was an isolated incident, and that it would not be repeated in the future. The court also found that the defendant was suffering from medical problems, and that incarceration in the State Prison was not an appropriate penalty.

The defendant's sentencing hearing was held on October 17, 1989. On that same date, the District Court

sentenced the defendant to five years in the Montana State Prison. However, execution of the sentence was suspended, except for the 35 days he had already served in the Cascade County Jail. He was placed on formal supervised probation under the rules and regulations of the Adult Probation and Parole Bureau and was ordered to enroll in a sexual therapy program at his own expense, and to continue in that program until it was no longer deemed necessary by his therapist. The specific sentence provision regarding sexual therapy was as follows:

> The defendant is to immediately enroll in a sexual therapy program at his own expense and continue said program until his therapist deems further counseling and therapy unnecessary. The Court would recommend that the defendant obtain his therapy at the sexual offender treatment program located in Helena, Montana.

As conditions of his suspended sentence, the defendant was also ordered to pay any counseling costs incurred by the victim and prohibited from being around children unless another adult was present.

On June 8, 1990, the County Attorney petitioned the District Court for revocation of the defendant's suspended sentence for two reasons: (1) the State contended that the defendant was not gainfully employed; and (2) the State alleged that the defendant had not completed the sexual treatment program which was a condition of his suspended sentence.

The defendant denied violating the terms of his suspended sentence, and an evidentiary hearing was conducted on August 31, 1990. At that hearing, the defendant's probation officer, and the counselor to whom

he had been referred for sexual therapy, testified. The defendant also testified on his own behalf.

The defendant testified that at that time he was living with his mother in Absarokee where he had moved following trial because he no longer had a business, a job, or any income.

He had interviewed for and sought work as an electrician, and as a custodian, but was unable to satisfy the physical requirements for either job. He suffered from high blood pressure and degenerative joint disease.

When unable to find employment, the defendant had applied for vocational rehabilitation through the State Department of Social and Rehabilitation Services. After an independent medical examination, he had apparently qualified for those services and was being retrained by SRS to do leather work which he was performing at his mother's home. He had sold some of the work and had orders for more items which he had been unable to complete.

He testified that in order to comply with the court's order regarding enrollment in a sex offender program he contacted his probation officer, who referred him to Mike Sullivan, a counselor in Billings, Montana. He scheduled and attended a number of counseling sessions, but was finally advised that he did not qualify for Sullivan's treatment program because he would not admit that he was guilty of the crime of which he had been charged and convicted. He then talked to Ron Silvers, the director of the sexual offender program in Helena, and was told that he would not be admitted to that program either.

Michael Sullivan testified that he is a licensed clinical social worker practicing in Billings, and was director of a

program known as South Central Treatment Associates. He has a bachelor's degree in psychology, a master's degree in associate work, and is a licensed social worker in the State of Montana. At the time of the defendant's hearing, Sullivan had been involved in the treatment of sexual offenders for approximately five years.

The defendant first saw Mr. Sullivan, by referral from his probation officer, on November 20, 1989, and saw him on five subsequent occasions over the next six months. Each appointment was scheduled by the defendant. The defendant attended every scheduled appointment. He was described by Sullivan as pleasant, friendly, never angry or abusive, and always punctual.

Sullivan performed a series of tests on the defendant. There were no indications in those tests that the defendant was capable of violent conduct. However, from those tests and his contacts with the defendant, Sullivan formed the impression that the defendant was not amenable to outpatient sexual offender treatment because he did not admit that he committed a sexual offense. Sullivan testified that the defendant's denial made it impossible for him to treat him in their program. He also testified that there was no other outpatient sexual therapy program in the State of Montana which would treat a sexual offender who denied that he was guilty of sexual misconduct.

He confirmed that after the defendant had been rejected from his program, the defendant had sought treatment from Ron Silvers at the sexual therapy program in Helena, and that he (Sullivan) had been contacted by Silvers to determine why the defendant had been unacceptable for the Billings program.

Sullivan recommended a form of inpatient treatment, which is more structured and continuous, because in such a program it is more difficult for a patient to maintain defensive postures, such as denial. He testified that the only inpatient treatment program in the State of Montana was the one at the Montana State Prison.

Based upon the foregoing evidence, the District Court found that the State's complaint about the defendant's lack of employment was not well founded. The court found that the defendant was making a bona fide effort to maintain employment and was actively pursuing vocational rehabilitation.

However, regarding the State's second basis for its petition to revoke the suspended sentence, the court made the following conclusion:

> The Court concludes that the defendant has violated the condition of his suspended sentence by not enrolling (not being amenable to treatment and hence, not acceptable into an out-patient treatment program) in a sex offender treatment program and said violation was proven by a preponderance of the evidence.
>
> . . . Because the only viable alternative is an in-patient treatment program, the Court concludes that the defendant's suspended sentence must be revoked and the defendant ordered to serve FIVE (5) years in the Montana State Prison with credit for 35 days.
>
> * * * *
>
> It is recommended to the Warden of the Prison that the defendant not be eligible for parole until he has completed the sexual offender treatment

> program at the Prison. However, it is also recommended that upon completion of the program, the defendant be considered for parole. The defendant is designated as a non-dangerous offender for parole eligibility purposes.

The defendant, through his attorney, objected at the time that the sentence was revoked on the grounds that the District Court was conditioning suspension of the defendant's sentence on an admission of guilt, and cited authority to the District Court that it could not force the defendant to plead guilty. The issue previously stated, therefore, was properly preserved for appeal.

DISCUSSION

While the District Court's order revoking the defendant's suspended sentence is predicated upon the defendant's failure to enroll in a sex offender treatment program, it is clear that the defendant's incarceration at the Montana State Prison is directly related to his refusal to admit that he committed a crime. The defendant made every other effort possible to enroll in and complete a sex offender treatment program. He sought a referral from his probation officer. He followed up that referral by scheduling not one, but six consecutive appointments. He attended every appointment in a timely fashion, and other than admitting his guilt, cooperated in every manner possible while at those appointments. When he was rejected by the counselor with whom he had spent six months, he tried to find another sex offender treatment program that would admit and treat him, and was rejected a second time. Finally, he was advised that there was no outpatient sex offender treatment program in Montana that would accept him.

It is clear that the only thing the defendant has failed to do is admit that he committed the crime for which he was convicted. Whether or not punishment can be augmented because of a defendant's refusal to admit guilt, even after he has been convicted, is a question on which the federal courts are not in agreement. Furthermore, this Court has made contradictory statements in answer to that same issue.

The majority of federal courts of appeal which have addressed this issue follow the decision of the United States Court of Appeals for the Fifth Circuit in Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).

In that case, prior to imposing sentence, the district court judge advised the defendant that if he confessed his guilt the court would take his confession into consideration in determining the length of his sentence, but that if he persisted in his denial of guilt, that denial would also be taken into account. Because the defendant chose to continue denying guilt, he was sentenced to the maximum term permitted by law. That sentence was vacated by the Fifth Circuit, based on its conclusion that the alternatives presented to the defendant violated his Fifth Amendment right not to be a witness against himself. The Court of Appeals acknowledged that the defendant had already been convicted, but pointed out:

> It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for new trial (including the opportunity to discover new evidence), appeal, petition for certiorari, and collateral attack. Indeed, appeal is now an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant.

> The two "ifs" which the district court presented to Thomas placed him in a terrible dilemma. If he chose the first "if," he would elect to forego all of the above-noted post-conviction remedies and to confess to the crime of perjury, however remote his prosecution for perjury might seem. Moreover, he would abandon the right guaranteed by the Fifth Amendment to choose not to be a witness against himself, not only as to the crime of which he had been convicted, but also as to the crime of perjury. His choice of the second "if" was made after the warning that the sentence to be imposed would be for a longer term than would be imposed if he confessed. From the record, it is clear that an ultimatum of a type which we cannot ignore or approve confronted Thomas. Truly, the district court put Thomas "between the devil and the deep blue sea."
>
> * * * *
>
> Thomas suffered the consequences for choosing the second "if" . . . in the form of a longer prison term. When Thomas received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty for exercising his constitutionally guaranteed rights. Upon this ground alone, we think that his sentence is "subject to collateral attack," and have *little* doubt as to the authority and duty of the district court to vacate the sentence.

Thomas, 368 F.2d at 945-46. In accord with Thomas, are Scott v. United States, 419 F.2d 264 (D.C.Cir. 1969); United States v. Laca, 499 F.2d 922 (5th Cir. 1974); United States v. Wright, 533 F.2d 214 (5th Cir. 1976). In Poteet v. Fauver, 517 F.2d 393 (3d Cir. 1975), the United States Court of Appeals for the Third Circuit concluded

that augmentation of a post-conviction sentence based on refusal to admit guilt violated the due process clause of the Fourteenth Amendment of the United States Constitution.

In the past, this Court has given apparent approval to the Thomas rule. Although the case of In the Matter of Jones, 176 Mont. 412, 578 P.2d 1150 (1978), was decided on other grounds, we cited with approval the following rule of law in that case:

> While the sentencing judge may take into account his belief that the defendant was not candid with the court this is to be distinguished from the rule that a sentence may not be augmented because a defendant refuses to confess or invokes his privilege against self-incrimination. *Fox v. State, (1977 Alaska), 569 P.2d 1335, 1338. See: United States v. Garcia,* (3rd Cir., 1976), 544 F.2d 681, 685; *United States v. Acosta,* (5th Cir., 1975), 509 F.2d 539, cert. denied, 423 U.S. 891, 96 S.Ct. 188, 46 L.Ed.2d 122 (1975); *United States v. Rogers,* (5th Cir., 1974), 504 F.2d 1079, 1085, cert. denied, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975).

The only Federal Circuit which appears to have arrived at a contrary conclusion is the Ninth Circuit.

In Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969), the Ninth Circuit Court of Appeals considered the Thomas decision and chose not to follow it. In that case, the defendant was also given a stiffer sentence because of his refusal to admit guilt after he was convicted, and challenged that sentence as a violation of his Constitutional privilege against self-incrimination. However, the Ninth Circuit, on balance, placed greater importance on the criminal justice system's objective of

rehabilitation, than on a defendant's continued right to deny guilt. In rejecting the Thomas rationale, the Ninth Circuit has stated:

> This case presents a dilemma which every trial judge faces at the time of sentence. It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault. In the present state of the criminal law, there is no doubt that punishment is still a consideration in the imposition of sentence, especially where non-violent or economic crimes are involved. But to the extent that rehabilitation is the objective, no fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence.
>
> * * * *
>
> Gollaher chose to insist upon his innocence. The judge, bound by the jury's verdict and apparently also being firmly convinced by the evidence that Gollaher was guilty, proceeded accordingly. He had before him a man unwilling to take the first step toward rehabilitation and he imposed sentence accordingly. Gollaher's Fifth Amendment rights were not infringed.

Gollaher, 419 F.2d at 530-31.

Our prior decision in State v. Donnelly, 47 St.Rep. 1600, 798 P.2d 89 (1990), appears to be in accord with the Ninth Circuit's decision in Gollaher. In Donnelly, we were asked to decide whether a defendant, who was already imprisoned at the Montana State Prison, was denied his right to avoid self-incrimination when he was denied

parole until he completed a sex offender course at the Prison. Interestingly, the evidence in that case was that in order to be accepted into the inpatient sexual offender program at the Prison, that defendant also had to admit that he committed the crime of which he was convicted. (Therefore, if the trial court's objective in this case was to obtain treatment for Donald Imlay, imprisonment does not appear to be the solution.) At any rate, we found that denying probation under those circumstances did not violate the defendant's privilege against self-incrimination. Our decision appears to have been based on the following conclusion:

> Here, defendant's decision to remain silent is a tactical one, not a compelled one. Defense counsel argues that, in reality, defendant's testimony is in fact compelled since it is a prerequisite for parole. It is possible the defendant may be paroled sooner if he admits to incest than if he remains silent. However, defendant may remain silent if he so chooses, and still possibly be paroled at some future date based on good behavior.
>
> Furthermore, failure to admit to incest will not result in certain penalty to defendant, it will only result to preserve his current ineligible parole status. In this case, the district court ordered that the defendant was ineligible for parole *until* the satisfaction of a condition subsequent. The condition subsequent is partially satisfied by defendant's successful completion of the sexual offender program at Montana State Prison. Failure to satisfy this condition subsequent, i.e., failure to satisfactorily complete the sex offender program, will not result in a penalty, but will

> merely result in defendant's continued ineligibility for parole.

Donnelly, 47 St.Rep. at 1607-08, 798 P.2d at 96.

Without debating the merits of the foregoing conclusion from Donnelly, it is clear that in this case the defendant is being subjected to a penalty that he would not otherwise be subjected to if he would simply admit his guilt. That penalty is that he serve time in the Montana State Prison.

Even though the defendant has already been convicted of the crime that he denies, our system still provides, as noted in the Thomas decision, for opportunities to challenge that conviction. For example, the defendant still had the right to challenge his conviction, based on newly discovered evidence, or by collateral attack. These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered meaningless if the defendant could be compelled to admit guilt as a condition to his continued freedom. Furthermore, while such a defendant would be foreclosed from invoking the protection of such procedures to establish his innocence, the reliability of an admission of guilt under such circumstances would be highly suspect. In addition, by admitting guilt in this case, the defendant would have to abandon his right guaranteed by the Fifth Amendment, not only as to the crime for which he has been convicted, but also to the crime of perjury. He testified in his own defense during this trial and denied committing the offense with which he was charged.

Under these circumstances, and absent any grant of immunity, we believe that the better reasoned decisions are those decisions which protect the defendant's constitutional right against self-incrimination, and which

prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination. To the extent that our decision in Donnelly is inconsistent with this opinion, that part of the Donnelly decision is overruled.

The sentence of the District Court is vacated and this case remanded to the District Court for further proceedings not inconsistent with this opinion.

/s/ Terry Trieweiler
Justice

We Concur:

/s/ J. A. Turnage
Chief Justice

/s/ John Conway Harrison
/s/ William E. Hunt Sr.
/s/ R. C. McDonough
Justices

MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

THE STATE OF MONTANA)	CAUSE NO.
Plaintiff,)	CDC-89-109
)	
vs)	
)	JUDGMENT OF
DONALD GLENN IMLAY,)	CONVICTION AND
Defendant.)	SENTENCING ORDER

On October 17, 1989, the above named defendant, DONALD GLENN IMLAY, personally appeared in Court for the purpose of being Sentenced herein. Other appearances were as follows: the defendant's attorney Billy Miller and Deputy Cascade County Attorney Kim Schulke. The defendant was found GUILTY after a Jury Trial of the offense of SEXUAL ASSAULT, A FELONY which involved a juvenile girl. At the time that the jury verdict was returned the Court revoked the defendant's bail and ordered that he be held in custody pending Sentencing. A Pre-Sentence Investigation was ordered and Sentencing scheduled for this time. The Court has received the Pre-Sentence Investigation which was prepared by the Adult Probation and Parole Bureau of Great Falls, and furnished a copy thereof to both counsel prior to Sentencing. The Court notes that 36 letters have been presented to the Court in connection with this Sentencing hearing. Additionally a psychological evaluation report prepared by Charles E. Jones has been filed with the Court. The County attorney filed a letter from the Mental Health Services Inc., together with standards for a Sex Offender Evaluation.

The County Attorney did not call any witnesses prior to Sentencing. The defendant's attorney called three witnesses to testify prior to sentencing.

Both the County Attorney and the defendant's attorney made a Sentencing recommendation to the Court.

The defendant was given an opportunity to make any statement or comments he wished prior to sentencing and he did make a statement to the court expressing sorrow for the criminal offense for which he was found guilty.

There was no legal reason shown why Sentencing should not be pronounced at this time.

The Court has considered the following matters in Sentencing this defendant.

The defendant was found guilty after a jury trial of sexually assaulting a juvenile girl at the Parkdale Grocery in Great Falls, Montana on April 11, 1989. The defendant has been incarcerated in the Cascade County jail for a period of 35 days. The defendant is 56 years of age and is a widower who has raised four children who are now adults. The defendant is presently unemployed but does have an extensive history of full time employment. The defendant has no military history. The Pre-Sentence report recommends that restitution be paid for any psychological or psychiatric expenses incurred by the victim, plus repayment to the Crime Victims Program for payments that have been made on behalf of the victim.

The defendant does not have a prior criminal record of either misdemeanors or felonies.

The defendant's wife of 36 years died of cancer in 1986. The defendant completed High School and has completed numerous vocational courses by correspondence.

The defendant's past employment history is noteworthy; he has worked on farms and ranches; he has worked at a lumber yard and sawmill; he has worked for the Great Northern and Northern Pacific Railroads; he has worked 19-1/2 years for the Anaconda Mining Company in Great Falls; he has worked for Moat Industries; and he is a member in good standing with the Electricians Local Union; and is owner and operator of Parkdale Grocery in Great Falls for a number of years.

Mr. Imlay was evaluated by Charles E. Jones on September 29, 1989. Dr. Jones administered a psychodiagnostic evaluation and administered various tests. The report indicates that the defendant has no previous psychiatric treatment or consultation and there is no evidence of prior behavioral treatment. The defendant is not an alcoholic and does not use dangerous drugs. Dr. Jones placed the defendant in the middle 50% of the population in IQ achievement. The defendant was diagnosed by Dr. Jones as having Post Traumatic Stress Syndrome. The report indicates that there is no latent or bizarre psychotic episodes and there are no sexual connotations in his test results. The defendant is presently experiencing a regressive and mentally depressive state of mind and a sense of no where to turn. In view of the defendant's disturbed depressive condition, Dr. Jones does not recommend any further incarceration. The recommendation of Dr. Jones is a mental health therapeutic program of psychiatric work and counseling.

The recommendations for Sentencing in this case range from a recommendation from the County Attorney

and the victim's mother to 20 years in the Montana State Prison to the defendant's attorney's recommendation of a five year Suspended Sentence. The Court has observed the defendant in the various proceedings in the courtroom and is cognizant of the many letters that have been received by friends of the defendant which are all very supportive of the defendant. The defendant has no prior criminal history and does not abuse alcohol or use dangerous drugs. The Court accepts the representations of the defendant's attorney that this defendant is not a dangerous person and that the present offense was an isolated incident which will not be repeated in the future. The Court concludes that a period of incarceration in the Montana State Prison is not appropriate in this case but rather a Suspended Sentence with supervised probation and expressed conditions would be the appropriate Sentence. The Court also is cognizant of the age of the defendant (56) and the fact that this defendant is presently suffering from some medical problems.

THEREFORE, IT IS HEREBY ORDERED that the defendant, DONALD GLENN IMLAY, is Sentenced to serve FIVE (5) years in the Montana State Prison. However, the execution of said Sentence is hereby Suspended except for the first 35 days thereof. The defendant is ordered to serve 35 days in the Cascade County jail but is given credit for the 35 days he has previously been incarcerated. During the Suspended portion of the Sentence the defendant shall be on formal supervised [sic] with the adult Probation and Parole Bureau of Great Falls and subject to their rules and regulations. In addition thereto the defendant shall be under the following conditions during the Suspended Sentence:

1. The defendant is to immediately enroll in a sexual therapy program at his own expense and continue

said program until his therapist deems further counseling and therapy unnecessary. The Court would recommend that the defendant obtain his therapy at the Sexual Offender Treatment Program located in Helena, Montana.

2. The defendant is required to pay for all psychological and psychiatric counseling costs incurred by the victim in this case. Additionally, the defendant is required to pay restitution for any monies spent by the Montana Crimes [sic] Victims Program which were incurred by the victim. The amount of said resitution [sic] shall be determined by the defendant's probation officer and a repayment program established so that the defendant may pay the restitution in installments. All payments are to be made to the Clerk of District Court, Cascade County Courthouse, Great Falls, Montana.

3. The defendant is prohibited from being alone with any minor female child [sic] unless there is another adult present at all times.

IT IS FINALLY ORDERED that pursuant to Section 46-18-236 MCA, the mandatory statutory surcharge of $20.00 is hereby assessed against this defendant. Said amount is to be paid to the Clerk of District Court, Cascade County Courthouse, Great Falls, Montana, as soon as possible.

DATED this 18th day of October, 1989.

/s/ Joel G. Roth
DISTRICT JUDGE

cc: County Attorney/Schulke
Billy Miller
Defendant
Adult Probation & Parole
Cascade County Sheriff

MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE MONTANA

THE STATE OF MONTANA	)	CAUSE NO.
Plaintiff,	)	CDC-89-109
	)	
vs	)	ORDER REVOKING
DONALD GLENN IMLAY,	)	SUSPENDED SENTENCE
Defendant.	)	AND SENTENCING
	)	ORDER

On June 13, 1990, the State, through the Cascade County Attorney, filed herein a Petition to Revoke the Suspended Sentence of defendant, Donald Glenn Imlay.

On July 6, 1990, the defendant personally appeared in Court and answered NOT TRUE to the alleged violations set forth in the Petition to Revoke.

An evidentiary hearing was held on August 31, 1990, on said Petition to Revoke Suspended Sentence. Appearances at the hearing were as follows: the defendant, Donald Glenn Imlay; the defendant's attorney Billy Miller; and Deputy Cascade County attorneys Kim Schulke and Lisa Bazant.

The State called two witnesses who were sworn and testified: Barbara Nihill and Michael D. Sullivan. The defendant was sworn and testified.

Following the presentation of the testimony and the admission into evidence of the defendant's exhibit "A: (a schedule of the defendant's earnings from his leather work in August 1990), both Kim Schulke and Billy Miller orally argued the Petition to Revoke and made sentencing recommendations.

The following shall constitute the Court's Findings of Fact and Conclusions of Law and Order herein.

The defendant was found guilty of Sexual Assault, a Felony, involving a minor female girl [sic] after a jury trial herein which concluded on September 13, 1989.

The defendant was sentenced on October 17, 1989 to FIVE (5) years in the Montana State Prison with the execution of all of said sentence suspended except the first 35 days. The defendant was ordered to serve 35 days in the Cascade County jail but given credit for 35 days he had been incarcerated. The defendant was placed on formal supervised probation with the Adult Probation and Parole Bureau of Great Falls, Montana. An additional condition (along with others which are not involved herein) imposed by the Court, was that the defendant was to immediately enroll in a sexual thereapy [sic] program at his own expense and continue said program until his therapist deems further counselling and therapy unnecessary.

The Petition to Revoke alleged two violations of conditions of the suspended sentence. The first related to the requirement that the defendant seek and maintain employment or maintain a program approved by the Adult Probation and Parole Bureau. The evidence presented with respect to said alleged violation established that the defendant had applied for employment as an electrician at the mines around Absorkee [sic], Montana, where he resided with his mother. However, because of the defendant's physical condition (he was under doctor's orders not to walk) he was denied employment. The defendant also applied for a job of custodian with the Absorkee school district, but was also denied employment there. (for the same reason) The defendant began working with the Department of Social and Rehabilitation

Services and was accepted in a program of vocational-rehabilitation involving leather work. The department paid for a correspondence course in leather work and also furnished some tools to the defendant. The defendant began performing leather work under the program and sold $320.00 of leather goods in August 1990. The defendant had applied for disability benefits while on probation but said requested benefits were denied. The defendant's supervising probation officer, Barbara Nihill, testified that the defendant did not have steady employment and his working time was not supervised.

The Court concludes that the defendant was making a bona fide effort to obtain employment and was accepted into a vocational-rehabilitation program and was actively pursuing said program. The Court concludes that the State has failed to establish by a preponderance of the evidence that the defendant was in violation of State Rule #4 which required that the defendant seek and maintain employment.

The second alleged violation related to the condition that the defendant immediately enrol [sic] in a sexual offender thereapy [sic] program. State's witness, Michael D. Sullivan, a licensed social worker, testified with regard to that condition. The defendant was referred to Mr. Sullivan by his supervising probation officer, Barbara Nihill. Sullivan is a co-director of South Central Teatment [sic] Associates in Billings, Montana, which provides a therapy program on an out-patient basis for sex offenders. The defendant and Sullivan met six times between November 20, 1989 and March 23, 1990 for a total of approximately 5½ hours. The defendant was not accepted into the program in Billings because he (the defendant) continued to deny the sexual assault of which he had been found guilty. In fact, during the defendant's testimony at this evidentiary hearing, he denied the sexual assault. The

sex offender thereapy [sic] program in Billings will not accept a person for therapy who denies commission of the sex offense.

The defendant also contacted Ron Silvers who is in charge of the Sexual Offender Treatment Program in Helena in order to apply for admission to that program. However, the evidence established that he was not accepted into that program either, apparently for the same reason as his non-acceptance into the Billings program. The testimony of Sullivan established that there are no out-patient sex offender treatment programs that will accept a person who denies having committed the sexual offense.

The only in-patient sex offender treatment program is located inside the prison at the Montana State Prison.

The Court concludes that the defendant has violated the condition of his suspended sentence by not enrolling (not being amenable to treatment and hence, not acceptable into an out-patient treatment program) in a sex offender treatment program and said violation was proven by a preponderance of the evidence.

After the filing of the Petition to Revoke Suspended Sentence, the Court received numberous [sic] letters from the defendant's family and friends, all supportive of the defendant. However, the court must accept the guilty verdict of the jury. The defendant's continuing denial of guilt forecloses his acceptance into an out-patient sex offender treatment program. However, the most important condition on the defendant's suspended sentence was that one relating to his immediate enrolling in a sex offender treatment program. Because the only viable alternative is an in-patient treatment program, the Court concludes that the defendant's suspended sentence

must be revoked and the defendant ordered to serve FIVE (5) years in the Montana State Prison with credit for 35 days.

THEREFORE, IT IS HEREBY ORDERED that the defendant's FIVE (5) year Suspended Sentence is revoked.

IT IS ALSO ORDERED that the defendant is sentenced to serve FIVE (5) years in the Montana State Prison with credit for 35 days already served.

It is recommended to the Warden of the Prison that the defendant not be eligible for parole until he has completed the sexual offender treatment program at the Prison. However, it is also recommended that upon completion of the program, the defendant be considered for parole. The defendant is designated as a non-dangerous offender for parole eligibility purposes.

IT IS FINALLY ORDERED that the defendant is remanded to the custody of the Cascade County Sheriff for transportation to the Montana State Prison.

DATED this 4th day of September, 1990.

/s/ Joel G. Roth
District Judge

cc: County Attorney/Schulke
Billy Miller
Defendant
Cascade County Sheriff
Adult Probation and Parole Bureau
Warden/Montana State Prison
St. ID
GFPD

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 90-493

STATE OF MONTANA,	)	
	)	
Plaintiff and Respondent,	)	
	)	**ORDER**
-v-	)	
	)	
DONALD GLENN IMLAY,	)	
	)	
Defendant and Appellant.	)	

Respondent, State of Montana, has filed with this Court a Petition for Rehearing, and Appellant, Donald Glenn Imlay, has filed his Objection to Respondent's Petition for Rehearing.

The Court having read and considered the Respondent's petition and Appellant's objections thereto,

IT IS HEREBY ORDERED that the Respondent's petition for rehearing is denied.

DATED this 23rd day of July, 1991.

/s/ J. A. Turnage
/s/ Terry Trieweiler
/s/ R. C. McDonough
/s/ William E. Hunt Sr.
/s/ John Conway Harrison
Justices